BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Review of the Commission's Broadcast	)	MM Docket No. 98-204
and Cable Equal Employment Opportunity	)	
Rules and Policies	)	
and	)	
Termination of the EEO Streamlining	)	MM Docket No. 96-16
Proceeding	)	

To: The Commission

COMMENTS

DELTA RADIO, INC.; UNITED COMMUNICATIONS CORPORATION; MAIN STREET BROADCASTING COMPANY, INCORPORATED; BROOKS BROADCASTING, L.L.C.; KMRI RADIO, LLC; POLLACK BROADCASTING COMPANY; WDAC RADIO COMPANY; PINEBROOK FOUNDATION, INC.; ALPHA & OMEGA COMMUNICATIONS, LLC; POLLACK/BELZ COMMUNICATION COMPANY, INC.; POLLACK/BELZ BROADCASTING CO., LLC; BALDWIN BROADCASTING COMPANY; EAGLE III BROADCASTING, LLC

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SUMMARY

The EEO rule proposed in the *Notice of Proposed Rulemaking* will not sustain scrutiny under the relevant constitutional tests. It cannot genuinely be disputed that the rule employs a racial classification. This being so, the Supreme Court's decision in *Adarand Constructors, Inc. v. Pena* and other controlling cases require that the rule be assessed under the standard of strict scrutiny. Because "program diversity" is not a compelling government interest and, in any event, the proposed rule is not narrowly tailored to achieve that interest, the FCC cannot overcome the burden of strict scrutiny review. Instead, the Commission should decide that employment discrimination complaints in the broadcast or cable context be referred to the Equal Employment Opportunity Commission in the first instance.

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COMMENTS

Delta Radio, Inc; United Communications Corporation; Main Street Broadcasting Company Incorporated; Brooks Broadcasting, L.L.C.; KMRI Radio, LLC; Pollack Broadcasting Company; WDAC Radio Company; Pinebrook Foundation, Inc.; Alpha & Omega Communications, LLC; Pollack/Belz Communication Company, Inc.; Pollack/Belz Broadcasting Co., LLC; Baldwin Broadcasting Company and Eagle III Broadcasting, LLC (the "Joint Commentors"), by their attorneys, hereby submit these Comments in response to the *Notice of Proposed Rule Making,* FCC 98-305, released November 20, 1998 ("*NPRM*"), in the captioned proceedings. The *NPRM* requests comment as to the cogency of a proposed new broadcast equal employment opportunity rule, in light of the U.S. Court of Appeals'

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[1] *Streamlining Broadcast EEO Rule and Policies*, MM Docket No. 96-16, FCC Rcd 5154 (1996).

decision in *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998), *rehearing denied*, September 15, 1998. The Commission's core argument is that the revised EEO rule passes constitutional muster because it requires only "outreach" efforts to achieve minority and female involvement in broadcast employment and ownership.

All of the Joint Commentors are committed to equal employment opportunity in recruitment and promotion. Discrimination on the basis of race and gender in employment is already illegal and will continue to be illegal even if the FCC forebears from the adoption of a new regulatory scheme in this area.

Minority and female employment in the broadcast industry has increased steadily over the last few decades, to the point that it cannot reasonably be argued that the industry as a whole is discriminating against minorities and women. On the other hand, most broadcasters, particularly those in smaller markets, are busy serving their communities. They have no extra time to devote to unnecessary paperwork imposed by governmental mandate. Therefore, the need for a new program of EEO regulation does not outweigh the burden that this new system would impose.

Moreover, we show below that the proposed rule -- like its precursor -- is problematic under the applicable constitutional standards. The rule fails regardless whether its predicate classification invites either "strict scrutiny" or a less stringent standard. Under strict scrutiny, the rule fails because it is not "narrowly tailored" and the asserted government interest is not

"compelling." The rule fares no better under intermediate or rational review because, even assuming the government interest at stake is "important," the rule lacks a sufficient nexus to that interest.

I. ANALYTICAL FRAMEWORK

Whenever a government agency confronts the aftermath of a court decision striking down one of its regulations as unconstitutional, the task of resurrecting the rule in a defensible form is most often a daunting one. This is especially true in equal protection cases, which by their nature turn on the difficult business of legislative classifications. In practice, it is often impossible to carve away the objectionable pieces of a bad rule without so distorting the rule's formulation that it is no longer serviceable, because it no longer has a meaningful relation to the goal it was designed to achieve. At that precarious point, the agency has a choice. It can concede the futility of its plan and turn its energies to other matters; or it can force the issue, as the FCC has done here.

There are tell-tale signs when this latter option is unlikely to succeed. Typically, one finds the agency purporting to re-cast the purpose driving its rule, in an effort to harmonize that policy with the rule's new, watered-down formulation. Because ambivalence and clarity make strained pendents, this produces a sort of agency double-speak, as if the government were bent on explaining how a square peg fits a round hole. This is particularly dangerous in cases where an agency regulation classifies on the basis of race. The Supreme Court

warned in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) that, "[b]ecause racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification *be clearly identified and unquestionably legitimate*." *Id.* at 229 (internal quotations omitted).

The FCC's strategy in the instant proceeding does not escape this pitfall. The vital parts of the legal analysis that must cohere in any valid defense to an equal protection challenge -- *i.e.*, *classification, legislative purpose*, and *fit* -- do not hold together here. We illustrate this below. Fundamentally, the EEO regulation cannot be fixed in the way the FCC proposes because it cannot merely be "tweaked." Only radical surgery would do, but that would "kill the patient" by exposing the essential confusion on which the FCC's salvage plan rests. In the end, the inconsistencies and ambiguities necessarily sparked by this approach are its undoing. It is neither coherent enough to withstand judicial review, or plain enough to give the regulated industry a reliable map for compliance.

* * *

Formally, the problem of equal treatment arises when a statute or regulation classifies one group differently from another in the pursuit of a particular social goal. Although equal protection arguments often become muddled because of the reluctance of one side to admit that a "suspect" classification is in play, this confusion is more often tactical than logical.

A classification is merely a differentiation on the basis of specified criteria, and discerning the presence of an overt classification is a simple matter of inspection. Indeed, nearly all laws make one type of classification or another. A classification is improper for equal protection analysis if it is not sufficiently related to the purpose of the regulation. Assessing the constitutionality of a regulation challenged on equal protection grounds therefore begins with the classification the rule employs. Ordinarily, not all members of the non-favored group will contribute to the state of affairs the government is trying to change, and some members of the favored group will contribute to that condition. Accordingly, regulatory classifications are typically both "overinclusive" and "underinclusive." The key is to specify the permissible degree of variance between the social goal and the classification used under a given set of circumstances.

A classification according to *race* must survive "strict scrutiny," which means that the government must be attempting to promote compelling social goals, and the use of the racial category must be almost essential if those goals are to be served. The fit between the social goal and the classification must be very close. "Indeed, the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the

motive for the classification was illegitimate racial prejudice or stereotype." *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion of O'Connor, J.).

Moreover, the standard of review under the Equal Protection Clause does *not* change according to the race of those burdened or benefitted by a particular classification. As long ago as *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978), Justice Powell's opinion announcing the Court's judgment rejected the argument that strict scrutiny should apply only to classifications that disadvantage minorities: "The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." 438 U.S. at 289-90. Thus, "[r]acial and ethnic distinctions of *any* sort are inherently suspect and thus call for the most exacting judicial examination." *Id.* at 291 (emphasis added).

Similarly, in *Wygant v. Jackson Board of Ed.*, 476 U.S. 267 (1986), where the Court considered whether a school board could adopt race-based preferences in determining which teacher to lay off, Justice Powell's plurality opinion observed that "the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination." *Id.* at 273. In other words, "racial classifications of any sort must be subjected to 'strict scrutiny.'" *Id.* at 285 (O'Connor, J., concurring in part and concurring in judgment). The plurality then concluded that the school board's interest in "providing minority role models for its minority students,

as an attempt to alleviate the effects of societal discrimination. . .was not a compelling interest that could justify the use of a racial classification." *Id.* at 274. Again, in *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), the Court held that "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification," and that the single standard of review for racial classifications should be "strict scrutiny." *Id.* at 493-494.

This principle was categorically affirmed in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), in which the Court addressed whether the Federal government violated the Fifth Amendment Due Process Clause when it used financial incentives in government contracts to encourage general contractors to hire minority subcontractors.

> [A]ll racial classifications, imposed by whatever Federal, State or local governmental factor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests. To the extent that *Metro Broadcasting* is inconsistent with that holding, it is overruled.

Adarand, 515 U.S. at 227.

Viewed from the angle of these basic principles, the FCC's revised EEO rule is not successful.

II. THE PROPOSED RULE CANNOT SURVIVE SCRUTINY

1. *The rule employs a racial classification.* In light of the D.C. Circuit's decision in *Lutheran Church*, the *NPRM* proposes a new EEO rule that "emphasizes outreach in recruitment to all qualified job candidates." *Id.* at ¶ 6. Like the prototypical agency strategy we

described at the beginning, wherein an agency reacts to an adverse court ruling by equivocating on the policy or purpose underlying the rule, many of the FCC's rhetorical glosses on the *purpose* of the new rule make no explicit reference to minorities. For example, the Commission urges that the new rule "will benefit job candidates by informing them of opportunities of which they might otherwise be unaware, benefit employers by casting the widest possible net for capable employees, and benefit the American people by enriching the programming distributed by the electronic media that plays such a vital role in our society." *Ibid.* Or again, "By tapping into the talents and abilities of all segments of the population, a broadcast station or cable entity increases the chances the viewers and listeners will be exposed to varying perspectives, and become familiar with a wider range of issues affecting their local community." *Id.* at ¶ 2.

Nonetheless, the new policy plainly classifies on the basis of race, as the following passages from the *NPRM* illustrate:

> [W]e seek to adopt EEO outreach requirements. . . .[O]ur revised EEO program requirements. . . .*would require licensees to inform women and members of minority groups of vacancies at the station and encourage them to apply*, but would not pressure broadcasters to adopt racial preferences in hiring or other employment decisions. *NPRM* at ¶18.
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> * * *
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> We believe that *ensuring that minorities and women are informed of*, and have an opportunity to apply for, openings at broadcast stations and cable entities will result in more diverse applicant pools which, in turn, will lead to a more diverse workforce, greater diversity of programming and a greater number of minorities and women with the type of experience in the broadcast

and cable industries that is seen as a prerequisite to ownership in these industries. *NPRM* at ¶ 63.

* * *

To afford more guidance to broadcasters and cable entities, we could require them to take specific steps, such as to use a minimum number of recruiting sources, to fill each job vacancy. For example, broadcasting and cable entities could be required to recruit for all vacancies by using a certain number of national and/or local recruiting sources and *a specified number (e.g., three) could be minority and female specific sources. We could require that at least one of the three specific sources would be minority and at least one would be female.* To ensure productivity of sources, *entities could be required to substitute a new minority or female specific source if its current minority/female source failed to refer any minority/female applicants for a specified number (e.g., three) of consecutive vacancies.*"

A variation of this approach would be to require entities to use a specific number of recruitment sources, but *tailor the number of sources required to the size of the local minority labor force.* For example, entities might be required to use fewer sources if their employment units were located in an area with a small minority labor force. *NPRM* at ¶¶ 65-66.

* * *

Traditionally, *the review of licensee efforts to recruit and attract females and minorities has encompassed all full-time positions* because, as discussed above, it is our belief that all positions may potentially influence programming. *We propose to continue this policy.* *NPRM* at ¶ 69.

These statements reveal that the FCC's proposed revision to its EEO policy *does* in fact incorporate a racial classification: The Commission would dictate action on the part of broadcasters *vis a vis* minorities as a class distinguishable from non-minorities. However, as the Supreme Court made unquestionably clear in *Adarand*, "*All* governmental action based on race . . . should be subjected to detailed judicial scrutiny." *Id.* at 226 (emphasis added).

The new rule therefore must be strictly reviewed by testing whether it is narrowly tailored to a compelling government interest. It is not.

2. *Program diversity is not a coherent or compelling interest.* Notwithstanding the *Lutheran Church* court's serious misgivings concerning the cogency of "programming diversity" as a compelling government interest, that social goal remains a linchpin of the FCC's proposal in the *NPRM*. Numerous passages of the *NPRM* make this clear. *See, supra*, Section II.1. Not surprisingly, even where the FCC attempts to make less obvious than in the past its reliance on program diversity as the vital interest in the balance -- with rhetorical flourishes citing other purposes for retaining the policy -- its reliance on program diversity still reverberates. For example, the *NPRM* states: "Measures that require broad and inclusive outreach efforts and non-discriminatory practices make good business sense and benefit employers because they increase an employer's chances of obtaining the services of the most talented people. On the other hand, discriminatory conduct in the absence of such outreach efforts may result in a staff of limited resources and also decreases broadcast stations' or cable entities' ability to deliver quality and diverse programming to the public." *Id.* at ¶ 3.

Program diversity as a government interest is problematic in various ways. Fundamentally, its meaning is unclear. Without an intelligible sense of the import of the interest the government invokes, it is impossible to test the "connection" -- the degree of fit -- between the rule and the social policy it aims to promote. As the *Lutheran Church* court

pointed out, "The Commission never defines exactly what it means by 'diverse programming.' (Any real content-based definition of the term may well give rise to enormous tensions with the First Amendment.) * * * The government's formulation of the interest seems too abstract to be meaningful." 141 F.3d at 354.

Assuming that the FCC envisages "the fostering of programming that reflects minority viewpoints or appeals to minority tastes," 141 F.3d at 354, the problem is compounded. Is it the business of government to encourage the notion that minorities have racially based views? Justice O'Connor's dissent in *Metro Broadcasting* underscores the invidiousness of that perspective:

> The FCC and the majority of this Court understandably do not suggest how one would define or measure a particular viewpoint that might be associated with race, or even how one would assess the diversity of broadcast viewpoints. Like the vague assertion of societal discrimination, a claim of insufficiently diverse broadcasting viewpoints might be used to justify equally unconstrained racial preferences, . . . And the interest would support the indefinite use of racial classifications, employed first to obtain the appropriate mixture of racial views and then to ensure that the broadcasting spectrum continues to reflect that mixture.....[T]he interest in diversity of viewpoints provides no legitimate, must less important, reason to employ race classifications apart from generalizations impermissibly equating race with thoughts and behavior.

497 U.S. at 614-15 (O'Connor, J., dissenting).

Moreover, the proposed rule does not reflect the reality of broadcast market dynamics, in which stations target particular audiences with particular formats. That choice is a function of business strategy and market forces, not the composition of the station's staff.

If, as the FCC apparently continues to hold, the makeup of staff has a meaningful affect on programming, how does a station owner proceed whose business plan contemplates a format that might not, using the stereotypes the FCC employs, typically be associated with certain minorities? The nexus is almost too absurd to posit.

Indeed, in the end, the FCC's logic crashes upon itself. At Paragraph 60 of the *NPRM*, the FCC requests comment on whether it should consider certain "types of evidence to be probative of discrimination." What might such evidence of discrimination be? According to the Commission, it includes "evidence derived from logical inferences of potential discrimination drawn from a licensee's *irrational explanations* to the Commission for EEO nonperformance, *e.g., claims that minorities prefer not to work in a particular format. . . .*" Thus, we find the FCC insisting on one hand that minority composition of staff bears a defensible nexus to the goal of program diversity, and on the other hand, suggesting that a station owner's perception of that very connection, can be evidence of the station owner's discrimination. These wholly contradictory conclusions are simply the logical extension of the premises the FCC itself constructed.

The FCC's argument also founders because of a further structural weakness. It is axiomatic that a rule of the sort the Commission wishes to promulgate must have a valid empirical basis in this context -- a legitimate reason for thinking that the rule it proposes is needed, even if it were otherwise constitutionally sound. The *NPRM*, however, contains no

evidence that this is the case. The Commission's only nod toward demonstrating "the value of our EEO requirements for the electronic media," *NPRM* at ¶5, is to assert that "[s]ince their implementation, [the EEO] rules have had a positive impact on increasing opportunities for minorities and women in the broadcast and cable industries." The empirical basis for that important statement is the dubious invocation of a statistic that "in 1971, women constituted 23.3% of full-time broadcast employees and minorities 9.1%," whereas, "[i]n 1997, women constituted 41.0% of broadcast employees and minorities 20.2%." *Id.* at ¶4. This statistic, of course, hardly provide reliable, probative data that the FCC's EEO rules are causally related, at least in any appreciable way, to the present-day minority composition of staff or station ownership.

Any number of other forces in American society over that 25 year period no doubt influenced the evolution the FCC claims single-handed responsibility for. This is so obviously fallacious -- *post hoc, ergo propter hoc* -- that one wonders how the Commission could have allowed so crucial a premise to be so vacuously supported.

The weakness in the FCC's argument in this connection has further repercussions. Basing the asserted value of the rule on such dubious evidence makes the Commission's proposal to impose a detailed record-keeping burden on broadcasters look all the more senseless, if not downright arbitrary. The paperwork requirements set forth in the *NPRM* are substantial, particularly in the case of small station operators who do not have the luxury of

executing multi-dimensional recruiting measures whenever one of a total staff of five, ten or even twenty employees should leave. For this reason, in the event the Commission ultimately were to adopt a new EEO rule, the threshold for imposition of the record-keeping requirement should be at least twenty employees.

* * *

We do not fault the Commission for attempting to craft a regulation which it believes will achieve a worthy social goal. The problem is that, as with most arguments animated more by ideology than logic, the FCC's approach cannot satisfy even the most relaxed test of rationality.

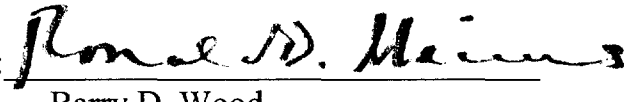
Justice Powell addressed this danger in *Bakke*: "Political judgments regarding the necessity for the particular classification may be weighed in the constitutional balance, but the standard of justification will remain constant. This is as it should be, since those political judgments are the product of rough compromise struck by contending groups within the democratic process. When they touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest. The Constitution guarantees that right to every person regardless of his background." *Bakke*, 438 U.S. at 299 (opinion of Powell, J.) (footnote omitted).

III. CONCLUSION

The proposed EEO rule should be abandoned. Aristotle put the essential point aptly in his *Poetics*: "For it is in the nature of a riddle for one to speak of a situation that actually exists in an impossible way." Because the new EEO rule could exist only in "an impossible way" -- that is, in violation of constitutional and logical principles -- it cannot be successfully pressed by the Commission, notwithstanding the good intentions which no doubt motivated the FCC's decision to fashion a new regulatory plan in this area.

Respectfully submitted,

JOINT COMMENTORS

By: 

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